SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-96678; File No. SR-CboeBZX-2023-002]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amend its Fee Schedule

January 17, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on January 3, 2023, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. <u>Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change</u>

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. <u>Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change</u>

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform ("BZX Equities") by modifying the existing NBBO Setter Program and deleting a definition that is no longer applicable, effective January 3, 2023.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the "Act"), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 15% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a "Maker-Taker" model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity.

The Exchange's Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above $1.00, the Exchange provides a standard rebate of $0.0016 per share for orders that add liquidity and assesses a fee of $0.0030 per share for orders that remove liquidity. For orders in securities priced below $1.00, the Exchange does not provide a rebate or assess a fee for orders that add liquidity and assesses a fee of 0.30% of total dollar value for orders that remove liquidity. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or

3 See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (December 15, 2022), available at https://www.cboe.com/us/equities/market_statistics/.

lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying more stringent criteria.

Under footnote 20 of the Fee Schedule, the Exchange offers the NBBO Setter Program, which is designed to improve market quality on the Exchange in certain securities. Specifically, qualifying orders in specific securities that yield fee codes B,[4] V,[5] and Y[6] are eligible for an additive rebate under Tier 1 of the NBBO Setter Program (the "NBBO Setter Tier"). Currently, the Exchange provides an additional rebate of $0.0003 per share to Market Participant Identifiers ("MPIDs") that have a Step-Up Setter ADAV[7] from May 2022 that is equal to or greater than 350,000 for orders in NBBO Setter Securities[8] that establish a new Setter NBBO.[9]

Now, the Exchange proposes to increase the applicable additional rebate of the NBBO Setter Tier to $0.0007 per share and to modify the criteria as follows:

(1) MPID has a Step-Up ADAV[10] from November 2022 greater than or equal to 5,000,000; and

(2) MPID has a Current Setter ADAV[11] greater than or equal to 3,000,000.

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4 Orders yielding Fee Code "B" are displayed orders adding liquidity to BZX (Tape B).

5 Orders yielding Fee Code "V" are displayed orders adding liquidity to BZX (Tape A).

6 Orders yielding Fee Code "Y" are displayed orders adding liquidity to BZX (Tape C).

7 "Step-Up Setter ADAV" means Baseline Setter ADAV in the relevant baseline month subtracted from Current Setter ADAV.

8 "NBBO Setter Securities" means a list of securities included in the NBBO Setter Program, the universe of which will be determined by the Exchange and published in a Notice distributed to Members and on the Exchange's website. The Exchange will not remove a security from the list of NBBO Setter Securities without 30 days prior notice (unless the security is no longer eligible for trading on the Exchange).

9 "Setter NBBO" means a quotation of at least 100 shares that is better than the NBBO or a quotation of a notional size of at least $10,000 that is better than the NBBO.

10 "Step-Up ADAV" means ADAV in the relevant baseline month subtracted from current ADAV.

11 "Current Setter ADAV" means ADAV calculated as the number of displayed shares added per day that establish a new Setter NBBO in NBBO Setter Securities.

Based on the above proposed change, the Exchange also proposes to delete the definition of Step-Up Setter ADAV from the Fee Schedule as it is no longer applicable.

The Exchange notes that the NBBO Setter Program will continue to be available to all Members and MPIDs and will provide Members and MPIDs an opportunity to receive an additional enhanced rebate (i.e., in addition to the applicable standard rebate and any other applicable tier). Moreover, the proposed change is designed to encourage Members that provide displayed liquidity on the Exchange to increase their overall add volume order flow, not just volume in NBBO Setter Securities that establish the NBBO, which would benefit all Members by providing greater execution opportunities on the Exchange and contribute to a deeper, more liquid market, to the benefit of all investors.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[13] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[14] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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12 15 U.S.C. 78f(b).

13 15 U.S.C. 78f(b)(5).

14 Id.

In particular, the Exchange believes that the proposed modified NBBO Setter Tier is reasonable, equitable, and not unfairly discriminatory. The proposed NBBO Setter Tier reflects a competitive pricing structure designed to incentivize participants to direct their order flow to the Exchange and enhance market quality in NBBO Setter Securities. Particularly, the Exchange believes the NBBO Setter Program tier, which provides an additional rebate to qualifying orders, continues to provide a reasonable means to encourage overall growth in Members' MPID order flow that establishes a Setter NBBO in NBBO Setter Securities. The Exchange believes the proposed first prong of the criteria under the NBBO Setter Program Tier 1 is also reasonably designed to incentivize overall growth in Members' MPID liquidity adding order flow in all securities. An overall increase in activity would deepen the Exchange's liquidity pool, offer more narrow spreads, support the quality of price discovery, promote market transparency, and improve market quality for all investors.

The Exchange believes that allowing MPIDs to qualify for the additive rebate under the NBBO Setter Tier by meeting the proposed criteria will promote price discovery and market quality in NBBO Setter Securities and, further, that the tightened spreads and increased liquidity from the proposal will benefit all investors by deepening the Exchange's liquidity pool, offering the potential for execution at more aggressive prices, supporting the quality of price discovery, enhancing quoting competition across exchanges, promoting market transparency, and improving investor protection.

The Exchange notes that the NBBO Setter Tier, even as amended, is not dissimilar from other volume-based rebates and fees ("Volume Tiers") that have been widely adopted by exchanges, including the Exchange, and are equitable and not unfairly discriminatory because it is open to all Members on an equal basis and provides a rebate that is reasonably related to the value of an Exchange's market quality. Much like Volume Tiers are generally designed to incentivize higher levels of liquidity on the Exchange, the NBBO Setter Tier is designed to incentivize enhanced market quality on the Exchange through tighter spreads, greater size at the inside, and greater quoting depth in NBBO Setter Securities by offering an additive rebate in NBBO Setter Securities. As such, the Exchange believes the proposed additive rebate in qualifying orders for NBBO Setter Securities will act to enhance liquidity and competition across exchanges in NBBO Setter Securities by providing a rebate reasonably related to such enhanced market quality to the benefit of all investors, thereby promoting the principles discussed in section 6(b)(5) of the Act. Additionally, the Exchange notes that the tier, even as amended, is comparable to other pricing tiers adopted by the Exchange and other exchanges that provide an enhanced rebate or supplemental incentive for firms that achieve a specified volume threshold in a specified group of securities.[15]

The Exchange also believes that the proposal represents an equitable allocation of reasonable dues, fees, and other charges because the criteria necessary to achieve the tier encourages Members to add liquidity on the Exchange. Further, the Exchange believes the proposed criteria, while more stringent than the current criteria, is commensurate with the proposed rebate, which is higher than the current rebate.[16] Moreover, the Exchange notes that it plans to add 223 symbols to the NBBO Setter Securities list (which would increase the number of NBBO Setter Securities to a total of 776 symbols) in tandem with this proposal, thereby providing additional opportunities for MPIDs to meet the proposed NBBO Setter Tier's criteria.

The Exchange believes that the proposal is also not unfairly discriminatory because all Members and MPIDs will continue to be eligible for the NBBO Setter Tier rebates and have the opportunity to meet the Tier's criteria and receive the corresponding additional rebate if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether these proposed changes would definitely result in any

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15 See Exchange Fee Schedule, Footnote 13, Tape B Volume and Quoting Tiers. See also MEMX Fee Schedule, Displayed Liquidity Incentive Tiers and Nasdaq Fee Schedule, NBBO Program.

16 The Exchange notes that it plans to add 223 symbols to the NBBO Setter Securities list in tandem with this proposal, thereby providing additional opportunities for MPIDs to meet the proposed NBBO Setter Tier's criteria.

Members qualifying for the NBBO Setter Tier. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on the prior months volume the Exchange anticipates approximately two Members (one MPID each) will be able to compete for and reach the criteria under the NBBO Setter Tier, as amended. The Exchange also notes that proposed changes will not adversely impact any Member's ability to qualify for reduced fees or enhanced rebates offered under other tiers. Should a Member not meet the proposed new criteria, the Member will simply not receive that additional rebate.

The Exchange also believes that the clarifying change to delete a non-applicable definition (i.e., the "Step-Up Setter ADAV" definition) from the Definitions section of the Fee Schedule is reasonable, fair and equitable and non-discriminatory because it is nonsubstantive and is designed to make sure that the Fee Schedule is as clear and understandable as possible. The Exchange notes the Step-Up Setter ADAV definition was only applicable to the existing NBBO Setter Tier, and as proposed is no longer applicable to the NBBO Setter Tier. Further, it is not otherwise applicable to any fees, rebates, or other incentive programs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the NBBO Setter Tier, as proposed, will continue to be eligible to all Members and MPIDs equally in that all Members and MPIDs have the opportunity to submit orders that could set the Setter NBBO and therefore qualify for the proposed increased additive rebate in NBBO Setter Securities. Furthermore, the Exchange believes that the proposed NBBO Setter Tier would incentivize Members to submit additional aggressively priced displayed liquidity to the Exchange, and to increase their order flow on the Exchange generally, thereby contributing to a deeper and more liquid market and promoting price discovery and market quality on the

Exchange to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The proposed non-substantive change to the Definitions section of the Fee Schedule is similarly non-burdensome as it will be available to all Members and provide a clear description of the terms applicable to the Fee Schedule.

The Exchange notes that as proposed the NBBO Setter Program does not impose a burden on intermarket competition as the proposal is intended to increase competition in U.S. equity securities that the Exchange believes will contribute to a deeper and more liquid market in these securities, which would in turn promote price discovery and market quality on the Exchange to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. The Exchange does not believe that the proposed changes represent a significant departure from pricing current offered by the Exchange or pricing offered by other equities exchanges. Members may opt to disfavor the Exchange’s pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 15% of the market share.[17] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[18] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.'… As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'…".[19]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

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17 Supra note 3.

18 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

19 NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act[20] and paragraph (f) of Rule 19b-4[21] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2023-002 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBZX-2023-002. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications

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20 15 U.S.C. 78s(b)(3)(A).

21 17 CFR 240.19b-4(f).

relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2023-002 and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Sherry R. Haywood,
Assistant Secretary.
[FR Doc. 2023-01118 Filed: 1/20/2023 8:45 am; Publication Date: 1/23/2023]

[22] 17 CFR 200.30-3(a)(12).